MERCER *v.* SOUTH ATLANTIC LIFE INS. CO.

Jan. 12, 1911.

[69 S. E. 961.]

1. Contracts (§ 1*)—Validity.—A contract binds the parties unless violative of law or public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1; Dec. Dig. § 1.* 3 Va.- W. Va. Enc. Dig. 437.]

2. Evidence (§ 441*)—Testimony Affecting Life Policy.—In a suit on a life policy, a parol agreement by insurer's soliciting agent varying the time and place for paying premiums, as provided in the policy, cannot be shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2046; Dec. Dig. § 441.* 9 Va.-W. Va. Enc. Dig. 345; 7 id. 768, 785; 14 id. 656, et seq.]

3. Insurance (§ 357*)—Life Policies—Forfeiture—Nonpayment of Premiums.—A life insurer can refuse a check for an overdue premium tendered while insured is fatally ill where he has not paid a renewal premium note, and had been notified that the right of forfeiture under the policy and under the note would be exercised on nonpayment of the note when due; such default not being waived by a subsequent letter requesting prompt payment.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. 357.* 9 Va.-W. Va. Enc. Dig. 345.]

4. Insurance (§ 175*)—Life Policies—Time of Taking Effect.—A life policy which provides that it shall take effect on payment of the initial premium for one year from its date cannot be regarded as having taken effect at delivery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 332; Dec. Dig. § 175.* 7 Va.- W. Va. Enc. Dig. 780, et seq.; 14 id. 656.]

Error to Law and Equity Court of City of Richmond.

Suit by Etta Mercer against the South Atlantic Life Insurance Company. Judgment for defendant, and plaintiff brings error. Affirmed.

John A. Lamb and *David Meade White,* for plaintiff in error.
E. Randolph Williams, for defendant in error.

NORFOLK & P. TRACTION CO. *v.* DAILY'S ADM'R

Jan. 12, 1911.

[69 S. E. 963.]

1. Electricity (§ 19*)—Negligence—Pleading and Proof.—In an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

action against a traction company, the declaration alleged that plaintiff's intestate was killed by lightning passing along defendant's trolley wire during a storm, and thence by a wire formerly used by defendant as an electric light wire connecting the trolley wire with a cluster of electric lights, underneath which plaintiff's intestate was standing, caused by defendant's negligence in failing to keep the electric light wire properly insulated and protected and in failing to remove the wire within a reasonable time after defendant ceased to use the light. Held, that evidence that the light wire was not actually connected with the other wire, but separated from it by such a small space that lightning could jump from one to the other, was admissible under the pleading.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.* 13 Va.-W. Va. Enc. Dig. 480; 15 id. 57.]

2. Electricity (§ 16*)—Negligence—Customary Act.—Loose or careless practices of other electric companies in protecting disused wires cannot be taken as a standard by which to determine whether or not a company engaged in a similar business has been negligent with respect to the installation and maintenance of proper lightning arresters, or other devices to prevent injuries, under similar circumstances.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 9; Dec. Dig. § 16.* 5 Va.-W. Va. Enc. Dig. 781.]

3. Electricity (§ 14*)—Personal Injuries—Care Required.—A traction company is required to exercise ordinary care with respect to its duties to install and maintain lightning arresters along its line of railway so as to prevent electric currents from passing from its wires to disused wires in proximity thereto.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 7; Dec. Dig. § 14.* 5 Va.-W. Va. Enc. Dig. 55, et seq.; 14 id. 377.]

4. Electricity (§ 19*)—Personal Injuries—Customary Methods.—In an action, against a traction company for death from a bolt of electricity which passed from defendant's wires to an unused wire extending to a house occupied by intestate, evidence held insufficient to establish a custom of electric companies to install lightning arresters in such cases so as to warrant submission of the question of defendant's negligence in that respect to the jury.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.* 10 Va.-W. Va. Enc. Dig. 352, 415, et seq.]

5. Electricity (§ 19*)—Personal Injuries—Question for Jury.—Whether a traction company which had installed a cluster of lights on a house near its track was negligent in discontinuing the lights so that bolts of electricity escaping from the trolley wires were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

grounded through the unused light wire, as a result of which plaintiff's intestate was killed while standing in the door of a house under the end of the light wire, held, under the evidence, a question for the jury.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.* 10 Va.-W. Va. Enc. Dig. 415, et seq.]

6. Evidence (§ 555*)—Competency.—In the absence of evidence that a traction company which had discontinued a cluster of lights maintained on a building near its tracks owed any duty, based on established usage, to the occupants of the house, to remove the disused wires, it was error to permit an expert witness to give his opinion that it is unsafe to leave a discontinued or disused wire on a house under the conditions stated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2376; Dec. Dig. § 555.* 5 Va.-W. Va. Enc. Dig. 781, et seq.]

7. Electricity (§ 19*)—Injuries from Production—Actions—Instructions.—In an action against a traction company for the death of plaintiff's intestate caused during an electrical storm while plaintiff's intestate was standing in the door of her father's house by lightning passing along defendant's trolley wire and thence by a wire formerly used by defendant as an electric light wire connecting the trolley wire with a cluster of lights immediately over the door in which plaintiff's intestate was standing, an instruction that defendant was liable if lightning was conducted to the house by a wire placed thereon by it in a negligent manner without reasonable care on its part to provide against the effects of lightning was not erroneous.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.* 5 Va.-W. Va. Enc. Dig. 55, et seq.; 14 id. 377.]

8. Electricity (§ 19*)—Injuries from Production—Actions—Instructions.—It was not error to instruct that, while defendant was not required to guarantee the safety of the wire attached to the house under all possible conditions, it was required to exercise that due and ordinary care which the present state of scientific knowledge as well as common observation of the nature of electricity and the power of lightning would suggest as reasonably necessary for the protection of life.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.* 5 Va.-W. Va. Enc. Dig. 55, et seq.; 14 id. 377.]

Error to Circuit Court, Norfolk County.

Action by Daily's administrator against the Norfolk & Portsmouth Traction Company. From a judgment for plaintiff,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

defendant brings error. Reversed and remanded. Harrison, J., absent.

William & Tunstall, for plaintiff in error.
Thorp & Bowden, for defendant in error.

Note.

The rule laid down here that ordinary care is all that is required of a company of this character, does not go as far as that announced in the West Virginia case, Bice *v.* Wheeling Electrical Co., 62 W. Va. 685, 59 S. E. 626, declaring that they are required to exercise the highest degree of care. But it will be noticed that the court here says that "ordinary care may, in some cases, involve the exercise of greater skill than in others," and distinguishes and reconciles Norfolk Railway, etc., Co. *v.* Spratley, 103 Va. 380, 49 S. E. 502. So it seems that the result is practically the same, the West Virginia court saying or requiring the highest degree of care, and our court requiring ordinary care, but saying that ordinary care means more in proportion as the risk is increased from the nature of the business engaged in.

J. F. M.

SOUTHERN RY. CO. *v.* FOSTER'S ADM'R.

Jan. 12, 1911.

[69 S. E. 972.]

1. **Trial (§ 252*)—Instructions—Applicability to Evidence.**—Instructions are to aid the jury to apply the law to the facts, and should be given only on the case which the evidence tends to sustain; so that one declaring the master's duty as to furnishing a safe place to work should not be given, though the declaration alleges negligence in the performance of the duty, in the absence of proof to sustain the allegation.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.* 7 Va.-W. Va. Enc. Dig. 718.]

2. **Master and Servant (§§ 101, 102*)—Duty of Master—Appliances.**—It is the master's duty to exercise ordinary care to provide, not "safe and suitable" appliances, but "reasonably safe and suitable" appliances, for the use of the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 173; Dec. Dig. §§ 101, 102.* 9 Va.-W. Va. Enc. Dig. 675, et seq.]

3. **Master and Servant (§ 206*)—Assumption of Risk—Manner of Conducting Business.**—Notwithstanding Const. 1903, § 162 (Code 1904, p. cclix), and Code 1904, § 1294k, abolish the doctrine of assumption of risk, so far as it applies to knowledge by a servant of a railroad "of the defective or unsafe character or condition of any machinery, ways, appliances or structures," he still assumes all the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.